

Damian Hart, et al.

No. CV-77-0479-PHX-NVW

Plaintiff,

ORDER

VS.

Tom Agnos, et al.

Defendant.

Pending before the court is Defendants' Motion to Reconsider Order Appointing Debra Hill and Margaret Winter as Class Counsel (doc. # 1231). The court agrees with Defendants the Order filed April 1, 2008 (doc. #1221) granting Plaintiffs' Motion for Appointment of Debra Hill and Margaret Winter as Class Counsel (doc. # 1212) was filed before Defendants' time to respond expired under LRCiv 7.2(c). The court, therefore, treats Defendants' Motion to Reconsider as their response to the Motion for Appointment and has considered the arguments presented therein. Because the court will deny the motion for reconsideration in all other respects, no reply from Plaintiffs is required.

First, the Order terminates representation by Theodore C. Jarvi as counsel for the Plaintiff class. (Doc. #1221.) Defendants do not object to the termination.

Second, the Order grants the motion to appoint attorney Debra Hill of Osborn Maledon, P.A., and attorney Margaret Winter of ACLU National Prison Project as class

1 counsel. (Doc. #1221.) Defendants do not object to Ms. Hill and Ms. Winter
2 representing the Plaintiff class.

3 Third, the Order directs that Ms. Hill and Ms. Winter “may request reimbursement
4 of fees pending further Order of the Court at an hourly rate no greater than that set by the
5 Prison Litigation Reform Act (150% of the prevailing CJA rate at the time the work is
6 done).” (Doc. #1221.) Defendants object to compensating Ms. Hill and Ms. Winter
7 under the Prison Litigation Reform Act (“PLRA”) and contend it is unclear when Ms.
8 Hill and Ms. Winter would be compensated. However, Fed. R. Civ. P. 23(h) provides,
9 “In a certified class action, the court may award reasonable attorneys’ fees and nontaxable
10 costs that are authorized by law or by the parties’ agreement.” Absent an agreement
11 between parties regarding compensation for Ms. Hill and Ms. Winter, any attorneys’ fee
12 award will be made as authorized by law. Under Rule 23(h) and in the context of the
13 January 24, 2008 hearing (doc. #1208) before Judge Earl H. Carroll regarding the
14 appointment of Plaintiffs’ class counsel and papers the parties have filed, the April 1,
15 2008 Order means that Ms. Hill’s and Ms. Winter’s compensation will be determined
16 under the governing statutory authority, *i.e.*, 18 U.S.C. § 3626 and 42 U.S.C. §§ 1997(e),
17 1983, 1988, unless the parties reach a different agreement. Under § 1988, the court may
18 award a reasonable attorney’s fee to the prevailing party. Under § 1997e, the court may
19 not award fees except to the extent the fee was directly and reasonably incurred in
20 proving an actual violation of Plaintiffs’ rights protected by a statute pursuant to which a
21 fee may be awarded under § 1988 and the fee was directly and reasonably incurred in
22 enforcing the relief ordered for the violation. Section 1997e also limits the hourly rate to
23 150 percent of the hourly rate established for payment of court-appointed criminal
24 defense counsel.

25 Plaintiffs have stated that Osborn Maledon and the ACLU National Prison Project
26 would be willing to accept the same contractual arrangement under which Mr. Jarvi
27 represented the Plaintiffs. (Doc. #1212 at 4 n.1.) Defendants have stated they want Ms.
28 Hill and Ms. Winter to “be compensated, if at all, consistent with the contractual

1 arrangements with Mr. Jarvi.” (Doc. #1231 at 5.) If Defendants want to pay Plaintiffs’
2 attorneys’ fees regardless of which parties prevail in order to avoid a potential increase in
3 the PLRA hourly rate and to be “better able to object to the fees” if received on a regular
4 basis without involvement of the court, as they have indicated, the parties are free to enter
5 into a fee agreement that does not violate applicable law and then to present it to the court
6 for approval.

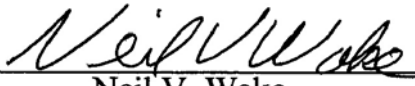
7 Further, Defendants ask the court to reconsider whether it is necessary for both
8 Ms. Hill and Ms. Winter to represent the Plaintiff Class. As Plaintiffs explained in 2006,
9 Defendants will have opportunity to object to award of fees for any duplicated efforts
10 when Plaintiffs seek attorneys’ fees if they prevail here, and Plaintiffs’ counsel are
11 mindful of their obligation not to duplicate effort. (Doc. #1152 at 6 n.5.)

12 Defendants also ask the court to decide now whether Defendants’ will be
13 responsible for any attorneys’ fees and costs incurred by Ms. Hill, Ms. Winter, and Ms.
14 Winter’s predecessor, David Fathi, prior to their appointment as class counsel. It is
15 premature for the court to do so. If the parties enter into an agreement regarding
16 attorneys’ fees, they may reach agreement on this issue. If the parties do not otherwise
17 agree, the court need not decide it unless and until the court has authority to award
18 attorneys’ fees under the applicable statutes.

19 IT IS THEREFORE ORDERED that Defendants’ Motion to Reconsider Order
20 Appointing Debra Hill and Margaret Winter as Class Counsel (doc. # 1231) is granted to
21 the extent that the court has provided Defendants opportunity to be heard on Plaintiffs’
22 Motion for Appointment of Debra Hill and Margaret Winter as Class Counsel (doc. #
23 1212) and denied in all other respects.

24 IT IS FURTHER ORDERED that the order of April 1, 2008 (doc.# 1221) is
25 reaffirmed, as clarified by this order

26 DATED this 16th day of April, 2008.

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Neil V. Wake
United States District Judge